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# Supreme Court Decisions

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# Supreme Court Decisions

CHATTEL MORTGAGES—RECORDING IN PROPER COUNTY—*The Colorado-New Mexico Wool Marketing Association vs. Mel H. Manning as Sheriff of Custer County*—No. 13338—*Decided January 21, 1935—Opinion by Mr. Chief Justice Butler.*

The marketing association sued the sheriff of Custer County to recover possession of certain wool. McKellar Brothers, owners of the sheep, entered into a contract with the association, which was recorded as a chattel mortgage in Fremont County. Under this contract an advancement was made to McKellar Brothers by the association. The sheep were kept on a ranch which lay partly in Fremont County and partly in Custer County. The mortgage stated that it was on wool "from," not "on" the sheep. The sheep were ranged in both counties. The wool was sheared in Custer County and stored in the said county when seized by the sheriff. The judgment below was for the defendant.

1. Since the mortgage was on wool severed from the sheep, the mortgage should have been recorded in Custer County.—*Judgment affirmed.*

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MARRIAGE AND DIVORCE—SPECIFIC PERFORMANCE OF SEPARATION AGREEMENTS—CONSTITUTIONALITY OF ACT OF 1933—*Titus vs. Titus*—No. 13513—*Decided January 21, 1935—Opinion by Mr. Justice Hilliard.*

Suit for specific performance of separation agreement and property settlement between husband and wife wherein husband agreed to pay $175 per month but defaulted. The separation agreement provided that its terms "may be enforced by proceedings in the usual form for specific performance of contracts."

The husband failed to make the payments and suit was instituted to which the husband interposed two defenses, namely, first, that in a former suit for specific performance a final judgment had been entered denying the application by the wife and, second, that the 1933 statute relating to "Marriage and Divorce" which, among other things, provides that any judgment denying specific performance shall be no bar to a new action was and is unconstitutional.

There was a demurrer to the two defenses above mentioned which was overruled by the trial court.

The statute was alleged to be unconstitutional on three grounds, namely, that the statute contained more than one subject; that it was an ex post facto law; that the legislature had invaded the powers of the judicial department.

HELD: The demurrer to the defenses should have been sustained. The provisions of the Act are not inconsistent with the title; the fact

that the Act creates relief which had formerly been denied by the court in a similar proceeding does not make the Act an ex post facto law because the provisions are remedial in character; the remedy provided by this statute is not an invasion of the power of the judicial department. —*Judgment reversed.*

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FRAUD—ACTION TO SET ASIDE DEED—ALLEGATIONS AND PROOF—FALSE REPRESENTATIONS—*DeVinna et al. vs. The Southern Colorado Bank of Pueblo*—No. 13116—*Decided January 28, 1935*—*Opinion by Mr. Justice Young.*

1. In an action to set aside a deed as a fraud on creditors, the plaintiff must allege and prove that the debt due him existed at the time of the conveyance, or that the conveyance was made with a view to the creation of future debts; also that at the time of the transfer the debtor did not have sufficient other assets subject to execution to pay his debts.

2. A false statement made to one person, long prior to the creation of the debt in question and with no relation to it, repeated to a third person by one who knew or should have known of its falsity, is not such a false representation to the third person for which the maker of the statement can be held in an action for fraud.—*Judgment reversed.*

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CRIMINAL LAW—CONFIDENCE GAME—FALSE PRETENSES—INSUFFICIENCY OF EVIDENCE—*Davis vs. The People*—No. 13606—*Decided January 28, 1935*—*Opinion by Mr. Justice Holland.*

Davis was convicted of the crime of confidence game and was sentenced to a term of eight to twelve years.

1. The crime of confidence game involves the use of some false or bogus means, token, symbol or device.

2. Where there is an absence of such, mere words, however false or fraudulent, do not constitute the crime of confidence game.

3. Evidence held insufficient to sustain the verdict of guilty.—*Judgment reversed with directions to dismiss.*

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MUNICIPAL CORPORATIONS—ORDINANCES—CIVIL SERVICE—*Mayor, Council and Manager of the City of Colorado Springs vs. Sanders and Others*—No. 13628—*Decided January 28, 1935*—*Opinion by Mr. Justice Bouck.*

Mandamus to reinstate three patrolmen dismissed without fault or delinquency by plaintiffs in error, under city ordinance providing efficiency tests to determine order of dismissals of city employees in such cases. Defendants in error were in the classified Civil Service, with time priority over others not dismissed.

HELD: By the City Charter, adopted under Article 20, Colorado Constitution, Civil Service regulations provide for dismissal without

fault or delinquency, in inverse order of appointment. The city ordinance is an unauthorized exercise of power under the City Charter, and as such invalid.—*Affirmed.*

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CRIMINAL LAW—MALICIOUS MISCHIEF—INTENT—*Morris Schtul vs. The People of the State of Colorado*—No. 13632—*Decided January 28, 1935*—*Opinion by Mr. Justice Young.*

The defendant was charged with violation of Section 6974 of the Compiled Laws of 1921. The defendant was operating his tractor on a highway in a deep snow. On account of the condition of the road the tractor became mired down, and he was unable to proceed farther. He then turned into a neighbor's property, where he could proceed directly to his own place by the shortest route. In driving over his neighbor's property it was necessary to cut the wires of his neighbor's fence. There was no evidence of any ill feeling between the defendant and his neighbor prior to this act, because of which a complaint was made. The defendant was found guilty.

1. There is no evidence of expressed malice nor such malice as the statute contemplates, nor can it be implied that the defendant was actuated by a desire to injure the complaining witness by cutting his fence. —*Judgment reversed.*

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RULE AGAINST PERPETUITIES—TRUSTS—CONSTRUCTION OF WILLS —*Ireland vs. Hudson, Executor*—No. 13344—*Decided February 4, 1935*—*Opinion by Mr. Justice Burke.*

Ireland was sole owner of the stock of an incorporated collection agency. In his will he provided that the agency be run by trustees; the net income to go, one-half to his wife and one-half to his sister for their lives; the whole to go to the survivor for her life, then to the employees of the company in certain proportions. The wife seeks to break this trust for the employees as void under the rule against perpetuities.

HELD:

1. The intent of the testator must, if possible, be ascertained and followed.

2. The presumption is that the testator disposed of all his property.

3. That the interests granted are absolute unless specifically qualified.

4. An unlimited gift of income without specific disposition of the corpus is deemed to be a gift of the corpus.

5. The corpus, here, is a framework of employees upheld by their efficiency and the good will of the business; aside from this it has little value. The gift of the income to the employees forever is construed to be an absolute gift of the corpus to the employees and not void under the rule against perpetuities.—*Judgment affirmed.*

WATER RIGHTS — ADJUDICATED PRIORITIES — MODIFICATION BY CONTRACT—RATIFICATION OF CONTRACT BY STOCKHOLDERS—LACHES—CONSIDERATION—ULTRA VIRES—*Kurtz vs. The Reorganized Catlin Canal Company et al.*—No. 13268—*Decided February 4, 1935—Opinion by Mr. Justice Hilliard.*

1. Owners of decreed water rights can change the manner of enjoyment thereof, by contract entered into after the adjudication decree has been rendered.

2. A corporation being a party to such a contract, its stockholders can effectively approve the agreement either immediately upon its execution or at some later time.

3. The doctrine of laches operates adversely to stockholders who for thirty years had taken no prior action in opposition to such an agreement.

4. The contract, being based upon mutual concessions, is not lacking in consideration, nor does it rest upon an illegal consideration; and it is not attended with public interest.

5. An irrigation company, having broad powers as set out in its articles, and as naturally pertain to such companies, acts within the reasonable scope of its powers when it compromises a suit attacking its irrigation priorities and settles the questioned matter by contract.—*Judgment affirmed.*

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NEGOTIABLE INSTRUMENTS — ALTERATIONS — RATIFICATION — ESTOPPEL—*Newmyer vs. Newmyer*—No. 13640—*Decided February 4, 1935—Opinion by Mr. Justice Campbell.*

Action on promissory note dated March 1, 1926, and plaintiff alleges that in 1929 by consent and agreement of the parties the due date was changed from March 1, 1931, to March 1, 1930. The defenses—alteration above—mentioned made with the defendant's consent and thereby voided and discharged the obligation. The trial court found that several years before this suit the plaintiff and defendant had a dispute regarding certain properties and in that other suit the defendant herein set up the claim that the particular promissory note sued on in this suit had been given to the plaintiff as a valid and binding obligation. In other words, in the former suit, the defendant claimed that this particular promissory note, with the alteration thereof, was a valid obligation and in this suit claims that it is invalid because of the alteration.

HELD: Since the defendant claimed the note was valid in the accounting action and received the benefit thereof, she ratified and acquiesced in the alteration and cannot now successfully claim that the note is void in this suit.—*Judgment affirmed.*

WATERS—PLEADING AND PRACTICE—NECESSARY PARTIES—*A. M. Cox et al. vs. Marie Olsen et al.*—No. 13325—*Decided February 4, 1935—Opinion by Mr. Justice Holland.*

The plaintiffs in error, who were the defendants below, and the defendants in error, plaintiffs below, together owned a one-eighth interest in a certain ditch and water right. The other seven-eighths interest was owned by a third person, not a party to this suit. Objection was made by the defendants during the course of the trial because of the lack of necessary parties and the court below placed the burden of maintenance and repair wholly upon the owners of the one-eighth interest and further barred the owner of the seven-eighths interest from any regulation in connection with the headgate. The decree was entered for the plaintiffs below.

1. Because the decree affected the rights of the owner of the other seven-eighths interest in the ditch, such owner should have been a party in the suit.

2. A court cannot authorize a water commissioner to determine and divide water after it leaves the headgate as between the users thereof, as there is no authority for it in the statute.—*Judgment reversed.*

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MUNICIPAL CORPORATIONS—MANDAMUS—CHARTER PROVISIONS—CIVIL SERVICE—POLICE SURGEON — *Milliken as Manager of Safety and Excise vs. Menser*—No. 13357—*Decided February 11, 1935—Opinion by Mr. Justice Holland.*

To review a judgment, making peremptory an alternative writ of mandamus sued out by Menser this writ is prosecuted by Milliken. Prior to June 18, 1918, Menser served in the police department of Denver as a provisional police surgeon. On that date Civil Service Commission submitted an eligible list of three for the position of police surgeon. Menser was third on the list and received the appointment after he and his wife had in writing waived any benefits from the Police Relief Fund.

1. Charter provisions of Denver relating to pension rights in the police department fall under two classifications, first, where the applicant has attained the age of 60 years and has been in the service for not less than 20 years and is certified by two physicians to be disabled and, second, where the applicant, regardless of age or length of service, suffers physical injuries resulting in total disability, while engaged in the line of duty.

2. Under the charter provisions of Denver no age limit is fixed

for the position of police surgeon, although age limit applies to other positions in the police department.

3. There being no charter age limit applicable to the position of police surgeon, the waiver that Menser signed was a nullity and he waived nothing thereby.

4. Menser, being over the age of 60 years at the time of his application for pension and not having been an active member of the department for 20 years preceding, does not fall within the first classification but comes within the second classification.

5. Under the second classification, physical injuries sustained while engaged in the line of duty must result in total disability, and that disability must be traceable to such injuries and not otherwise, and where it does not affirmatively appear from the report of the examining physician that Menser's disability is so traceable, the finding of the Manager of Safety that Menser was ineligible to the pension cannot be disturbed, in the absence of abuse of discretion.—*Judgment reversed.*

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PUBLIC DOMAIN—CONSTITUTIONAL LAW—TEMPORARY INJUNCTION—*Wyman vs. Bell et al.*—No. 13063—*Decided February 4, 1935*—*Opinion by Mr. Chief Justice Butler.*

Defendant below was held in contempt for grazing his sheep on cattle range in violation of a temporary injunction issued under the Public Domain Range Act. (Ch. 125, S. L. 1929).

1. The evidence tends to show that the grazing was not limited to occasional grazing while the sheep of defendant were in transit across the range to lands leased by him.

2. The Public Range Act is constitutional.

3. Any objection as to the power of the court to enter the injunction was waived by defendants consenting to its entry.—*Judgment affirmed.*

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WATERS—NON-USER—STATUTE OF LIMITATIONS—EASEMENTS—*The Fruit Growers Ditch and Reservoir Co. vs. James W. Donald*—No. 13385—*Decided February 11, 1935*—*Opinion by Mr. Justice Campbell.*

This is a controversy between Donald and Fruit Growers Ditch and Reservoir Company concerning alleged ownership of the rights of

Donald in and to one-half foot of water for irrigating his forty-acre tract of land. Donald prevailed below.

1. Mere non-user of an easement acquired by grant, however long continued, does not create an abandonment. This occurs only where in connection with non-user there is a denial of title or some act by an adverse party, or attendant facts and circumstances showing an intention on the part of the owner of the easement to abandon it and the mere fact that the non-user continues for the prescriptive period is immaterial, in the absence of any adverse acts on the part of the servient owner.

2. Where an easement in a ditch is created by deed such a right cannot be lost or abandoned by non-user alone short of the period for limitations of an action to recover real property, which is twenty years in Colorado.—*Judgment affirmed.*

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HUSBAND AND WIFE—MARRIAGE—DIVORCE—PRESUMPTIONS—BURDEN OF PROOF—*Minerva E. Jones vs. Carl S. Milliken as Trustee of the Police Relief Fund and Myra S. Jones*—No. 13305—*Decided February 25, 1935*—*Opinion by Mr. Chief Justice Butler.*

Jones married Myra in 1881 and they separated in 1901 when Jones commenced work as an officer on the Denver police force. In 1902 Jones went through a marriage ceremony with Minerva and continued to live with her until his death in 1931.

Question: Whether Minerva or Myra was the legal widow and as such entitled to receive a pension.

Held: The law presumes innocence, not guilt; morality, not immorality; marriage, not concubinage. It follows that there is a presumption that the second marriage is valid and that all obstacles thereto, if any, had been removed; that presumption is not overcome by a presumption that a former marriage once shown to exist continues. The presumption in favor of a second marriage is not conclusive. However, one attacking such marriage has the burden of proving its invalidity. When evidence is introduced tending to show the invalidity of a second marriage the question of its invalidity is to be determined by the jury or by the Court when sitting without a jury, in the light of all facts and circumstances in evidence and the reasonable inferences to be drawn therefrom. The facts of this case disclose that there had been no prior divorce and therefore the second marriage was invalid. The trial Court so found and its finding will not be disturbed.—*Judgment affirmed.*

CRIMINAL LAW—ACCESSORIES—JURISDICTION OF COURT—WITHDRAWAL FROM CRIME—VALUE OF PROPERTY—*Newton vs. The People*—No. 13637—*Decided February 4, 1935*—*Opinion by Mr. Justice Burke.*

The plaintiff in error, who was the defendant below, was tried and convicted of the crime of grand larceny. The facts show that Mrs. Newton, a resident of New Mexico, never entered the State of Colorado but she perpetrated, aided and abetted and gave encouragement to and furnished articles with which others shot and killed a steer in the State of Colorado, which they carried to New Mexico and which was consumed by these persons and the defendant, Newton.

I. Mrs. Newton was clearly an accessory and by being such is deemed a principal by our statutes, Section 6645, C. L. 1921.

II. The courts of Colorado clearly had jurisdiction over the defendant, Newton, even though she never entered this state.

III. There is no evidence of a withdrawal from the enterprise on the part of the defendant.

IV. Even though at the trial there was no proof of the value of the steer, under Section 6728, C. L. 1921, the theft of livestock is grand larceny regardless of value.—*Judgment affirmed.*

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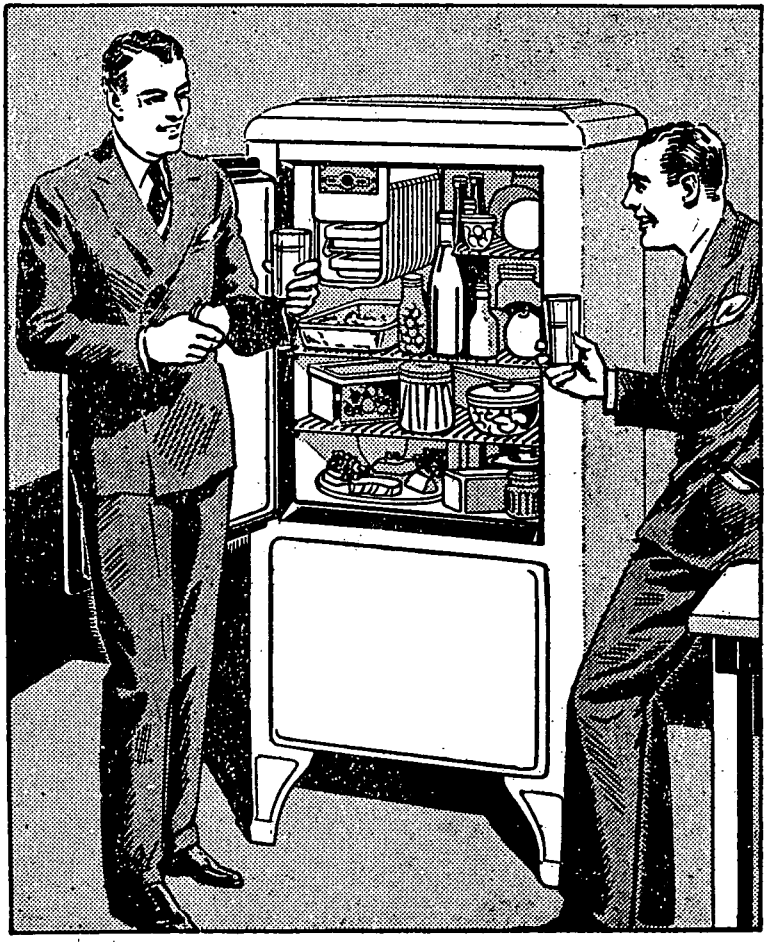

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